6-14-2013

# Western Home Transport v. Dept. of Labor Respondent's Brief Dckt. 40462

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| WESTERN HOME TRANSPORT, INC., | ) | |
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| Appellant/Employer, | ) | SUPREME COURT NO. 40462 |
| | ) | |
| vs. | ) | **BRIEF OF IDAHO** |
| | ) | **DEPARTMENT OF LABOR** |
| STATE OF IDAHO, | ) | |
| DEPARTMENT OF LABOR. | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
THOMAS E. LIMBAUGH, CHAIRMAN


APPELLANT/EMPLOYER
WESTERN HOME TRANSPORT, INC.

BY: DAVID H. LEROY
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1130 East State Street
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RESPONDENT
IDAHO DEPARTMENT OF LABOR

BY: LAWRENCE G. WASDEN
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317 W. Main Street
Boise, ID 83735
ISB No. 4213

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TABLE OF CASES AND AUTHORITIES

## STATEMENT OF THE CASE

(1) Nature of the Case:

Western Home Transport, Inc., (hereinafter "Appellant") appeals the Industrial Commission's (hereinafter "Commission") Decision and Order that the remuneration Appellant paid to its drivers who transported mobile homes for Appellant's customers was wages for services performed in covered employment for Idaho unemployment insurance purposes.

(2) Course of the Proceedings Below:

The Idaho Department of Labor (hereinafter "Department") issued a redetermination on September 23, 2011, concluding that remuneration paid by Appellant to its interstate transport drivers for work performed from January 1, 2008 through December 31, 2010 was wages for services performed in covered employment. Exhibit 3. Appellant filed a timely appeal on October 5, 2011. Exhibit 4. On May 16, 2012, the Department's Appeals Examiner held a hearing where all parties were represented by legal counsel. Exhibit 1. On June 4, 2012, the Department's Appeals Examiner issued a decision affirming the Department's redetermination. R. pp. 1-12.

On June 18, 2012, Appellant filed a timely appeal of the decision to the Commission. R. pp. 13-17. After a *de novo* review of the record, the Commission issued its Decision and Order on October 2, 2012, affirming the Appeals Examiner's decision. R. pp. 22-37. Appellant filed a timely Notice of Appeal to this Court on November 1, 2012. R. pp. 38-40.

(3) Statement of Facts:

Appellant is an Idaho corporation engaged in the business of providing the interstate transport of manufactured homes and modular buildings. Tr. p. 11, L. 25; p. 12, L. 1; p. 209, Ll. 10-11. In order to engage in interstate transport, a business must first obtain a Motor Carrier (MC) number issued by the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation and a U.S. Department of Transportation (DOT) number also issued by the United States Department of Transportation. Tr. p. 13, Ll. 18-25; p. 14, Ll. 5-12.

Appellant's interstate transport drivers owned their trucks and leased them to Appellant. Tr. p. 28, Ll. 1-3. As a result of the lease agreements, Appellant acquired the exclusive possession, control and use of the trucks. Exhibit 7; Tr. p. 21, Ll. 15-19; p. 22, Ll. 7-8; p. 74, Ll. 3-5; p. 135, Ll. 24-25; p. 136, L. 1; p. 245, Ll. 18-22; p. 275, Ll. 6-25; P. 276, Ll. 1-6. Appellant did not operate any trucks under its MC/DOT authority that were not leased from Appellant's drivers. Tr. p. 28, Ll. 1-3; p. 214, Ll. 18-23; p. 218, Ll. 23-25; p. 259, Ll. 17-22. The lease agreements drafted by Appellant were for a term of thirty days and then continued month to month until terminated at will by either party. Exhibit 7.

Appellant covered all of its interstate transport drivers with Appellant's MC/DOT authority. Tr. p. 87, Ll. 14-22; p. 193, Ll. 9-19; p. 259, Ll. 14-16. As a result, Appellant required its drivers to place decals on the sides of its leased trucks signifying to authorities that the trucks were being operated under Appellant's MC/DOT authority. Tr.

p. 253, Ll. 21-25; p. 254, Ll. 1-7. Appellant identified each truck by a fleet number it assigned. Tr. p. 91, Ll. 9-21. The insurance identification cards only identified Appellant as the insured. Exhibit I; Tr. p. 166, Ll. 24-25; p. 167, L. 1. The required insurance identified each truck by the unit number assigned by Appellant. Tr. p. 167, Ll. 4-13. Appellant's drivers could not drive the trucks for anyone else while the trucks were leased to Appellant and displayed Appellant's MC/DOT decals. Tr. p. 203, Ll. 6-25; p. 204, Ll. 1-19. Appellant required its drivers to maintain daily contact and to obtain Appellant's written authorization before transporting any commodity. Exhibit 7; Tr. p. 251, Ll. 10-13; p. 260, Ll. 18-25.

Appellant acknowledged that having MC/DOT authority over the interstate operation of the leased trucks gave it the inherent right to direct and control the details of the work. Tr. p. 245, Ll. 11-14. Appellant's interstate transport drivers could not assign someone else to make the transport. Tr. p. 263, Ll. 6-8

Appellant's drivers obtained their own commercial driver's license and covered their own expenses for medical exams and drug tests. Tr. p. 73, Ll. 17-19; p. 173, Ll. 13-14. They also maintained and repaired their trucks. Tr. p. 73, Ll. 6-16; p. 172, Ll. 19-25; p. 173, Ll. 1-7. Because Appellant was legally responsible for the safety of the trucks, Appellant required its drivers to attend safety meetings. Tr. p. 31, Ll. 3-5; p. 265, Ll. 23-25; p. 266, Ll. 1-2. Appellant, and not its interstate transport drivers, would be cited for any DOT safety violations. Tr. p. 259, Ll. 2-4; p. 267, Ll. 23-25. Appellant could lose its MC/DOT authority based on the conduct of its drivers. Tr. p. 266, Ll. 3-5. Because

Appellant's MC/DOT authority and liability were at stake if Appellant's drivers did not properly maintain their trucks, drivers would be fired if their trucks were not properly maintained. Tr. p. 30, Ll. 20-25; p. 31, Ll. 1-2.

Appellant did not withhold taxes or provide benefits for its drivers. Tr. p. 32, Ll. 11-22. Appellant paid its drivers a percentage of each load. Tr. p. 75, Ll. 21-25. Appellant loaded the driver's payment onto a comdata card set up by Appellant. Tr. p. 85, Ll. 14-21; p. 189, Ll. 9-25. Appellant provided advances to its drivers to allow them to pay for fuel costs and road taxes. Exhibit 7; Tr. p. 22, Ll. 1-4; p. 32, Ll. 17-20; p. 261, Ll. 9-18; p. 269, Ll. 16-17. Without the advances, Appellant's drivers could not afford to front the funds necessary to cover them. Tr. p. 32, Ll. 11-20. Appellant also reimbursed the drivers for fuel surcharge costs. Tr. p. 182, Ll. 4-6; p. 187, Ll. 2-10. Appellant audited and recorded fuel purchased by its drivers and filed International Fuel Tax Agreement (IFTA) reports with the State Tax Commission. Tr. p. 261, Ll. 9-18. Appellant obtained all the necessary insurance in Appellant's name, writing the check to the insurance company and then passing the cost onto its drivers. Exhibit 7; Tr. p. 28, Ll. 9-21; p. 89, Ll. 10-25; p. 90, Ll. 1-2; p. 94, Ll. 23-25; p. 95, Ll. 1-4; p. 155, Ll. 2-11; p. 224, Ll. 1-13; p. 225, Ll. 8-11. Appellant required its drivers to maintain an escrow account with a minimum balance of $300 to cover insurance premiums. Exhibit 7. Appellant reimbursed the drivers the cost of hiring a pilot car when the driver turned in the freight bill. Tr. p. 76, Ll. 4-9; p. 186, Ll. 15-25; p. 187, Ll. 1-15. Appellant reviewed the driving record of each driver before it ordered drivers' licenses. Tr. p. 226, Ll. 7-14.

Appellant hauled oversized loads where special trip permits and routes of travel were required. Tr. p. 237, Ll. 14-18. The State of Idaho required Appellant to verify its MC/DOT authority and insurance coverage in order to obtain a permit. Tr. p. 271, Ll. 5-6. Appellant paid for the trip permits and billed their cost directly to Appellant's customers. Tr. p. 270, Ll. 19-23, Appellant made all arrangements for the loads and provided all the transport jobs to its drivers. Tr. p. 259, Ll. 5-8. Appellant's name was on all the paperwork at the ports of entry, on freight bills and on bills of lading. Tr. p. 259, Ll. 9-16. Appellant created the price quotes for its transport services. Tr. p. 230, Ll. 23-25; p. 231, Ll. 1-9. Appellant was required to complete all bills of lading and freight billings before its driver could transport under Appellants MC/DOT authority. Tr. p. 259, Ll. 5-15; p. 267, Ll. 2-12. Appellant had the exclusive possession, control and use of the equipment preventing its drivers from going "willy nilly out and haul[ing] someone else's product without our [Appellant's] freight bill and our papers. . . ." Exhibit 7; Tr. p. 275, Ll. 11-25; p. 276, Ll. 1-6. Appellant classified all drivers as independent contractors and the Department reclassified them as employees. Exhibit 3. Tr. p. 219, Ll. 1-8.

## ISSUES ON APPEAL

I.

Should the Court follow the principle of *stare decisis* and apply controlling precedent that truck drivers operating solely under another's federal motor carrier and U.S. Department of Transportation authority were not, and legally could not be,

independently established in their own interstate transportation business for purposes of Idaho's Employment Security Law?

II.

Is there substantial and competent evidence in the record to support the Industrial Commission's findings and conclusions that the drivers were as a matter of law employees and not independent contractors?

III.

Should attorney fees and costs be awarded to the Department in an appeal from an administrative proceeding?

## STANDARD OF REVIEW

In proceedings involving tax liability under the Employment Security Law, the provisions of the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code, regarding contested cases and judicial review of contested cases, are not applicable. Idaho Code § 72-1361.

In appeals from decisions of the Industrial Commission, the Court's review is limited to questions of law. Idaho Constitution, Article V, § 9; *Pimley v. Best Values, Inc.*, 132 Idaho 432, 434, 974 P.2d 78, 80 (1999). This Court does not reweigh the evidence or consider whether it would have reached a different conclusion. *Ginther v. Boise Cascade Corporation*, 150 Idaho 143, 147, 244 P.3d 1229, 1233 (2010). While conflicting evidence may exist in the record, the Court will not disturb the Commission's

factual findings unless they are clearly erroneous. *Id.* The factual findings of the Commission will be upheld provided they are supported by substantial and competent evidence. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Painter v. Potlach Corporation*, 138 Idaho 309, 312, 63 P.2d 435, 438 (2003), *citing Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). In reviewing a decision of the Commission, the Court views all facts and inferences in the light most favorable to the party who prevailed before the Commission. *Ginther v. Boise Cascade Corporation*, 150 Idaho at 147, 244 P.3d at 1233.

## ARGUMENT

### I.

The principal of *stare decisis* requires controlling precedent be followed that truck drivers operating solely under another's federal motor carrier and U.S. Department of Transportation authority were not, and legally could not be, independently established in their own interstate transportation business for purposes of Idaho's Employment Security Law.

There is simply no new principal of law that requires this Court to overturn its prior decision in *Giltner, Inc. v. Idaho Department of Commerce and Labor*, 145 Idaho 415, 179 P. 3d 1071 (2008). This Court has repeatedly held that controlling precedent

will not be overruled "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate the plain, obvious principles of law and remedy a continued injustice." *State v. Humphreys*, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990). *See also*, *State v. Guzman*, 122 Idaho 981, 1010, 842 P.2d 660, 680 (1992), *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 240, 953 P.2d 989, 990 (1998) and *State v. Watts*, 142 Idaho 230, 127 P.3d 133 (2005).

The record in this case establishes that Appellant's interstate transportation drivers drove under Appellant's MC/DOT authority. Tr. p. 87, Ll. 14-22; p. 193, Ll. 9-19; p. 259, Ll. 14-16. Federal MC authority is the legal operating authority that allows the transportation of non-exempt goods across state lines. Tr. p. 13, Ll. 18-25. An interstate transportation company's federal DOT number is a unique identifier used for collecting and monitoring a company's safety information. Tr. p. 14, Ll. 1-12. Both the MC authority and the DOT number are issued by the Federal Motor Carrier Safety Administration. Tr. p. 13, Ll. 16-25.

By federal law, a business cannot operate as a motor carrier without registering with the U.S. Secretary of Transportation. See 49 U.S.C. § 13901. The Secretary's registration requires motor carriers to comply with federal statutes and regulations governing the interstate transportation of goods and imposes minimum financial responsibility on motor carriers for personal or property damage caused by a motor carrier's negligent operation, maintenance or use of the motor carrier's vehicles. See 49

U.S.C. § 13902(a)(1). As a registered motor carrier with MC/DOT authority, Appellant acknowledged that it could lose its authority to operate an interstate transportation business should Appellant's drivers operating under its MC/DOT authority fail to comply with the requirements of the federal motor carrier law and regulations. Tr. p. 30, Ll. 20-25; p. 31, Ll. 1-5; p. 259, Ll. 2-4; p. 265, Ll. 23-25; p. 266, Ll. 1-5; p. 267, Ll. 23-25.

The appellant in *Giltner* was an interstate transportation company that engaged owner/operator drivers who were paid a percentage of each load. *Giltner*, 145 Idaho at 418, 179 P. 3d at 1074. Each owner/operator driver entered into a "Contractor Operating/Lease Agreement" and an "Equipment Lease Agreement" with Giltner. *Giltner*, 145 Idaho at 418, 179 P. 3d at 1074. In analyzing the second "independently established" prong of the Department's statutory independent contractor test, this Court noted that Giltner's owner/operator drivers were dependent on Giltner's DOT authority to haul goods interstate and had no independent authority to operate without Giltner's DOT authority. Idaho Code § 72-1316(4)(b) and *Giltner*, 145 Idaho at 420, 179 P. 3d at 1076. Therefore, this Court held, as a matter of law, that Giltner's owner/operator drivers could not be engaged in their own independently established interstate transportation business for purposes of Idaho's Employment Security Law. *Giltner*, 145 Idaho at 420, 179 P. 3d at 1076.

In this case, Appellant is also a transportation company providing the interstate transportation of manufactured homes and modular buildings. Tr. p. 11, L. 25; p. 12, L. 1; p. 209, Ll. 10-11. Appellant engaged drivers and paid them a percentage of the income

it received from the loads they delivered. Tr. p. 28, Ll. 1-3. Appellant did not have any trucks of its own and leased the trucks it operated from its interstate transportation drivers. Tr. p. 28, Ll. 1-6; p. 214, Ll. 18-23; p. 218, Ll. 23-25; p. 219, Ll. 1-8; p. 259, Ll. 17-22. Appellant entered into lease agreements it drafted with its drivers giving Appellant the exclusive possession, control and use of each vehicle. Exhibit 7; Tr. p. 21, Ll. 15-19; p. 22, Ll. 7-8; p. 74, Ll. 3-5; p. 135, Ll. 24-25; p. 136, L. 1; p. 245, Ll. 18-22; p. 275, Ll. 6-25; p. 276, Ll. 1-6. Appellant's drivers were required to drive a truck identified with Appellant's MC/DOT authority. Exhibit 29; Tr. p. 13, Ll. 16-25; p. 14, Ll. 5-12; p. 18, Ll. 3-7; p. 34, Ll. 21-23; p. 259, Ll. 14-16. Appellant's drivers were dependent on Appellant's MC/DOT authority to haul goods interstate. Appellant provided all the services that an independent contractor would otherwise provide like bills of lading, trip permits, paperwork, fuel tax filings, insurance, accounting, advances to cover upfront costs of fuel and its MC/DOT authority. Appellant's interstate transportation drivers testified that they did not have their own MC/DOT authority. Tr. p. 87, Ll. 14-22; p. 193, Ll. 14-25; p. 194, Ll. 1-4. Appellant's witness, Michael Byington acknowledged that he was not independent. He testified:

> I have to get my own authority and I don't know how to do that and if I go totally independent I can't even afford to do that and I don't know – and I don't know all the contacts and everything and -- you know. Because I will go to some places that I don't even know they existed or whatever.

Tr. p. 193, Ll. 24-25; p. 194, Ll. 1-4. Without their own MC/DOT authority, Appellant's interstate transportation drivers were not, and legally could not have been, independently

established in their own interstate transportation business.

Courts in various states have also found owner/operator drivers to be covered employees for unemployment insurance purposes under facts similar to those in this case. In *Byrne Trucking Inc. v. Employment Division*, 32 Or. App. 229, 574 P.2d 664, *aff'd*, 284 Or. 443, 587 P.2d 473 (1978), Byrne engaged in interstate commerce, procured the freight, collected the charges from shippers and its owner/operators paid all expenses, chose their own routes, and controlled the method of loading. Byrne leased trucks from its drivers. Bryne required its drivers to display its signage on their trucks and the trucks were driven exclusively for Byrne. As in this case, Bryne's drivers had no business they could sell apart from the value of the trucks. In *Western Ports Transportation, Inc. v. Employment Security Department*, 10 Wash. App. 440, 41 P.3d 510 (2002), the court also found that the owner/operators were employees under circumstances similar to *Byrne*. The Supreme Court of New York in *Claim of Short*, 233 A.D. 2d 676, 649 N.Y.S. 2d 955 (1996) found the owner/operators to be employees with facts similar to *Byrne* and *Western Ports Transportation*. *See also*, *K&D Auto Body, Inc. v. Division of Employment Security*, 171 S.W. 3d 100 (2005).

Other courts have found owner/operators to be independent contractors and have not seized upon MC/DOT authority as a determinative factor. Appellant argues that a case cited by the Commission, *Merick Trucking Co. v. Missouri Department of Labor and Industrial Relations*, 933 S.W.2d 938 (1996), is nothing like the relationship between Appellant and its drivers. Unlike this case, the putative employer leased its trucks to its

drivers and paid many of the costs that Appellant passed on to its drivers. *Merick*, 933 S.W.2d at 941. However, the court in *Merick* found persuasive the fact that drivers were entirely dependent on Merick's favor because it held the federal Interstate Commerce Commission permit. *Id.* The Court noted in affirming the Commission below, that the Commission "understood the economic reality that the drivers were dependent on Merick. *Merick*, 933 S.W.2d at 942. Although Merick paid for some of its driver's expenses, its drivers could never have been independently established. "Merick handled the billings, Merick could terminate the relationship at any time, and there was no evidence that the drivers ever drove for another trucking firm." *Merick*, 933 S.W.2d at 941.

Here as in *Merick*, Appellant's drivers were entirely dependent on Appellant's MC/DOT authority. Appellant handled the billing and the drivers had virtually no financial risk. Appellant prevented its drivers from going "willy nilly out and haul[ing] someone else's product without our [Appellant's] freight bill and our papers. . . ." Tr. p. 275, Ll. 11-25; p. 276, Ll. 1-6. As in these cases, this Court in *Giltner* found the MC/DOT authority to be distinctive and a driver's use of a third party's MC/DOT authority for the interstate transportation of goods clearly means that that driver was not and could not be independently established in the driver's own interstate transportation business.

In *Giltner*, this Court specifically contrasted *Hernandez v. Triple Ell Transport, Inc.*, 145 Idaho 37, 175 P.3d 199 (2007). This Court noted that Hernandez had his own

MC/DOT authority and the putative employer was merely his only client. Hernandez could at any time have terminated his agreement and gone elsewhere to haul loads in interstate commerce using his own MC/DOT authority. *Giltner,* 145 Idaho at 420, 179 P.3d at 1076. Also distinguishable for this same reason is *Hammond v. Department of Employment*, 94 Idaho 66, 480 P.2d 912 (1971). Like Mr. Hernandez, the drivers in *Hammond* did not drive under the putative employer's MC/DOT authority. The case of *National Trailer Convoy, Inc. v. Employment Security Agency of Idaho*, 83 Idaho 247, 360 P.2d 994 (1961), can also be distinguished because at the time this Court issued its ruling in *National Trailer*, the test to determine an independent contractor's exemption from covered employment did not require that workers be independently established in their own business. Instead, *National Trailer* was decided using the common law test.

Further, the statutory employee status of owner/operator drivers is well established. For purposes of preventing motor carriers from evading responsibility for accidents caused by its owner/operator drivers, courts have found owner/operators to be the statutory employees of the business entity legally responsible for complying with the DOT regulations governing the use of the driver's vehicles. *Zamalloa v. Hart*, 31 F. 3d 911 (9th Cir. 1994).

The record in this case establishes that Appellant's interstate transportation drivers drove under Appellant's MC/DOT authority. Tr. p. 87, Ll. 14-22; p. 193, Ll. 9-19; p. 259, Ll. 14-16. Consequently, it was legally impossible for Appellant's drivers to be independently established in their own interstate transportation business. Therefore,

the Commission's decision that Appellant's interstate transportation drivers were Appellant's employees for purposes of Idaho's Employment Security Law should be affirmed.

Appellant's simple assertion that this Court should reconsider its prior ruling ignores the principle of *stare decisis*. Recognizing that our judicial system needs to respect the rule of law and provide predictability and continuity over time, this Court has stated that having previously decided an issue, with no new basis upon which to reconsider the issue, it would be guided by the principle of *stare decisis* and adhere to the law as already expressed by the Court. *State v. Odiaga*, 125 Idaho 384, 388, 871 P.2d 801, 805 (1994). Appellant has not provided any argument to show that *Giltner* was manifestly wrong, unwise, or unjust or that overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. Appellant has simply shown that the law is inconvenient and does not fit within its style of conducting its interstate transportation business.

II.

There is substantial and competent evidence in the record to support the Industrial Commission's findings and conclusions that the drivers were as a matter of law employees and not independent contractors as held in *Giltner, Inc. v. Idaho Department of Commerce and Labor*.

The Idaho Legislature, finding economic insecurity due to unemployment a serious threat to the well-being of Idahoans, enacted Idaho's Employment Security Law to encourage employers to offer stable employment and to pay benefits during periods of unemployment. Idaho Code § 72-1302. This Court has held that Idaho's Employment

Security Law should be construed liberally to effectuate that purpose. *Davenport v. State, Department of Employment*, 103 Idaho 492, 494, 650 P.2d 634, 636 (1982).

Under Idaho's Employment Security Law, "covered employers" are required to pay contributions to the employment security fund based on wages paid employees for services rendered in "covered employment." *King v. Department of Employment*, 110 Idaho 312, 313, 715 P.2d 983 (1986). The law imposes an obligation on employers to report wages paid for "covered employment" and to pay unemployment insurance taxes based upon the reported payroll.

The law defines "covered employment" as "an individual's entire service performed by him for wages or under any contract of hire, written or oral, express or implied." Idaho Code § 72-1316. Idaho Code § 72-1328 defines wages as "all remuneration for personal services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash." It is undisputed that Appellant paid its owner/operator driver a percentage of the loads they hauled. Tr. p. 75, Ll. 21-25. By definition, this remuneration constitutes "wages" paid to the drivers.

In *Software Associates, Inc. v. State of Idaho, Department of Employment*, 110 Idaho 315, 715 P.2d 985 (1986), the Supreme Court explained that "the term 'covered employment' as used in the Employment Security Act is an expansive term, 'sweeping within its purview employees and independent contractors alike." *Id.* at 316, 715 P.2d at 986, (citing *King v. Dept. of Employment*, 110 Idaho 312, 715 P.2d 982 (1986)). To

escape from this broad, expansive net of "covered employment," a putative employer must "exempt out" of covered employment by demonstrating that it qualifies for the statutory exemption for independent contractors. *Id.* In *Software Associates*, the Supreme Court reaffirmed that the statutory exemption for independent contractors is "to be narrowly construed." *Id.* (emphasis added); see also *Branchflower v. Department of Employment*, 128 Idaho 593, 597, 947 P.2d 750, 754 (1996) ("[W]hen the Court construes taxing statutes and most remedial legislation, exemptions from coverage should be narrowly construed.")

To that end, Idaho Code § 72-1316(4) presumes wages are received for services in covered employment unless the employer proves:

> (a) That the worker has been and will continue to be free from control or direction in the performance of his work, both under his contract of service, and in fact; ***and,***
>
> (b) That the worker is engaged in an independently established trade, occupation, profession or business.

(Emphasis added).

Idaho Code § 72-1361 provides that the party appealing a determination of coverage has the burden of "proving each issue appealed by clear and convincing evidence." An employer must prove by clear and convincing evidence that the services provided by its workers satisfy both Idaho Code §§ 72-1316(4)(a) and 72-1316(4)(b) to demonstrate the services do not constitute "covered employment." See IDAPA Rule 09.01.35.112.05 (A worker who meets one but not both of the tests shall be found to perform services in covered employment.)

There is substantial and competent evidence in the record to support the finding of the Industrial Commission that Appellant did not demonstrate by clear and convincing evidence that its owner/operator drivers were engaged in an independently established trade, occupation, profession or business. Appellant's drivers drove under Appellant's MC/DOT authority. Without the drivers' own MC/DOT authority, they could not independently operate their own interstate transportation business. One of Appellant's drivers admitted that he could not afford to be totally independent and that he did not have the contacts to do so. Tr. p. 193, Ll. 24-25; p. 194, Ll. 1-4. The only way for Appellant's drivers to survive economically was to work under Appellant's MC/DOT authority or the MC/DOT authority of someone else. Tr. p. 263, Ll. 3-5. There is no evidence in the record that Appellant's drivers worked for anyone else. Appellant was the sole facilitator for its driver's economic survival. Tr. p. 262, L. 21. Without their own MC/DOT authority, none of Appellant's owner/operator drivers were, or could have been, independently established in their own interstate transportation business.

The Commission was bound to follow this Court's decision in *Giltner* as a matter of law. While compliance with federal regulations does not demonstrate control, without the statutory authority to work independently, a worker cannot be engaged in an independently established trade, occupation, profession or business. The Commission's decision to follow this Court's ruling in *Giltner* was supported by substantial and competent evidence. The Commission noted that this Court is not alone in its determination that DOT authority is a linchpin in commercial transportation cases

involving the assessment of the covered employment relationship. This Court's ruling in *Giltner* is binding on the Commission as a matter of law.

III.

The Idaho Department of Labor is entitled to attorney fees and costs on appeal.

Attorney fees on appeal are appropriate, pursuant to Idaho Appellate Rule 41(a) and Idaho Code § 12-117. Appellant has provided no substantive evidence *Giltner* was manifestly wrong, unwise, or unjust or that overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice, therefore, the Department should be entitled to attorney fees in this matter.

CONCLUSION

There is no evidence that *Giltner* was manifestly wrong, unwise, or unjust or that overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. There is substantial and competent evidence in the record to support the Industrial Commission's findings and conclusions that the drivers operating under Appellant's MC/DOT authority were by operation of law employees. The Department asks the Court to affirm the Commission's decision.

Respectfully submitted,

CHERYL GEORGE
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14th day of June, 2013, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon the following by hand delivery to:

DAVID H. LEROY
1130 East State Street
Boise, Idaho 83712